1994

State of Utah v. Rogelio Limonta Leyva : Brief of Appellee

Utah Court of Appeals

Marian Decker; Assistant Attorney General; Jan Graham; Attorney General; Attorney for Appellee.
Ronald S. Fujino; Robert L. Stott; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 940758-CA
v.	:	
ROGELIO LIMONTA LEYVA,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM CONVICTION FOR FAILURE TO RESPOND TO AN OFFICER'S SIGNAL TO STOP, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 41-6-13.5 (1993), IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE J. DENNIS FREDERICK, PRESIDING.

MARIAN DECKER (5688)
Assistant Attorney General
JAN GRAHAM (1231)
Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1022

Attorneys for Appellee

RONALD S. FUJINO
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

ROBERT L. STOTT
Deputy District Attorney
231 East 400 South
Salt Lake City, Utah 84111

ORAL ARGUMENT NOT REQUESTED

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDING

This an appeal from a conviction for failure to respond to an officer's signal to stop, a third degree felony, in violation of Utah Code Ann. § 41-6-13.5 (1993).

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(f) (1995).

STATEMENT OF ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Did the trial court properly conclude that defendant's waiver of Miranda rights was knowing, intelligent, and voluntary?

A trial court's legal conclusion of a valid Miranda waiver is reviewed for correctness. State v. Pena, 869 P.2d 932, 941 (Utah 1994). "However, this standard of review grants a measure of discretion to the trial court because of the variability of the factual settings." Id. Indeed, "[i]n the face of a factual dispute which necessarily bears upon credibility, it [is] for the trial court to appropriately weigh the evidence and assess credibility of the witnesses." State v. Allen, 839 P.2d 291, 299 (Utah 1992). These underlying factual

determinations are reviewed for clear error. Id. Accord State v. James, 858 P.2d 1012, 1016 (Utah App. 1993).

2. Did the trial court properly limit defendant's cross-examination of Trooper Wassmer?

Defendant's constitutional challenge is waived for failure to adequately raise it below, State v. Johnson, 774 P.2d 1141, 1144-45 (Utah 1989), and for failure to articulate a plain error or other exceptional circumstance excusing the waiver. State v. Martinez, 848 P.2d 702, 705 n.2 (Utah App. 1993); State v. Archambeau, 820 P.2d 920, 922 (Utah App. 1992). Defendant's evidentiary challenge is waived for failure to comply with the briefing rule. Utah R. App. Pro. 24(a)(9); State v. Price, 827 P.2d 247, 249 n.5 (Utah App. 1992).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Any relevant text of constitutional provisions, statutes and rules pertinent to the resolution of the issues presented on appeal is contained in the body of this brief.

STATEMENT OF THE CASE

Defendant was charged with failure to respond to an officer's signal to stop, a third degree felony, in violation of Utah Code Ann. § 41-6-13.5 (1993), and possession of a controlled substance (cocaine), a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i)(1994), which charge was subsequently dismissed (R. 7-8, 21).

Defendant moved to suppress evidence obtained in alleged violation of the state and federal constitutions (R. 23-

24). Following an evidentiary hearing on the matter, the trial court denied defendant's motion (R. 63-66).

A jury trial was held October 11-12, 1995, at the conclusion of which defendant was convicted as charged (R. 147).

The trial court sentenced defendant to zero to five years in the Utah State Prison, to be served consecutive to any other term defendant was then serving (R. 153).

STATEMENT OF THE FACTS[1]

At approximately 9:00 p.m. on the evening of July 24, 1994, Utah Highway Patrol Trooper Jon Wassmer was patrolling south bound traffic on I-15 near 4500 South in Salt Lake City, Utah (R. 208). A yellow car travelling ahead of the trooper caught his attention because it was "sagging badly to one side" (R. 209). Surprised that the yellow car could have passed inspection, Trooper Wassmer ran a license plate check based on his suspicion that the driver had switched the plates on the car (R. 209). Dispatch reported that the plates on the yellow car were registered to a 1984 Buick (R. 210). Trooper Wassmer pulled up alongside the yellow car and confirmed that it was not a Buick, but a 1988 Oldsmobile (R. 210). Defendant, who was the sole occupant of the car, glanced over at the trooper as he travelled along side of defendant's car (R. 210-11).

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[1] Since the primary issue on this appeal is the suppression issue, the pertinent facts are gleaned from the transcript of the suppression hearing held September 26, 1994 (R. 205-243).

Based on the license plate violation, Trooper Wassmer determined to stop defendant's car (R. 211). He turned on his overhead emergency lights and pulled up within a few feet of defendant's rear bumper (R. 211). Defendant immediately sped up, increasing his speed from approximately 55 m.p.h. to 75 m.p.h. (R. 212). Trooper Wassmer turned on his siren and began to pursue defendant's fleeing car (R. 212). Trooper Wassmer observed that defendant "was just jamming his way through traffic," forcing other drivers to "take evasive type action" (R. 212). Defendant "passed in the emergency lane when all the lanes were occupied, much faster than the traffic flow" (R. 212).

At one point defendant started down the 7200 South off-ramp "and then he cut back across . . . the painted island, and back on to the freeway" (R. 212). In pursuing the fleeing vehicle, Trooper Wassmer observed defendant "speeding, cutting people off, passing in the emergency lane, . . . [and] following too close" (R. 212).

Defendant left the interstate again at the 9000 South off-ramp, again "pass[ing] to the right of a vehicle[] in the emergency lane" (R. 213). The chase came to end when defendant crashed at the bottom of the off-ramp: "[H]e was going way too fast to take the turn at the bottom . . . , and he crashed into the island" (R. 213). As the trooper approached to arrest him, defendant put his hands in the air (R. 214).

Trooper Wassmer immediately handcuffed and searched defendant before placing him in the patrol car (R. 214-15).

Trooper Wassmer did not read defendant his Miranda[2] rights at that time, waiting instead until he "intended to do formal questioning" (R. 215). However, in the course of handcuffing defendant, Trooper Wassmer did ask, "So why were you running from me?" (R. 229). Trooper Wassmer may have also inquired if defendant was on probation and also asked about cocaine in plain view in the car, all prior to advising defendant of his Miranda rights (R. 224).[3]

Trooper Wassmer conducted formal questioning on these same topics after defendant was advised of his Miranda rights, one half hour after his arrest (R. 223, 229-30). Trooper Wassmer asked defendant if he understood each of his Miranda rights (R. 216). Defendant responded "Yes" (R. 216). Trooper Wassmer then asked defendant: "Having these rights in mind, do you want to talk to us now?" (R. 216). Defendant said, "I don't know" (R. 216). Trooper Wassmer explained that defendant "didn't have to talk to [them] if he didn't want to. He didn't have to answer questions. ['] Its up to you.[']" (R. 217). Defendant indicated that he understood the trooper's explanation by nodding his head up and down (R. 217). Noting defendant's affirmative response, the trooper asked: "So why did you run?" (R. 217). Defendant

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[2] See Miranda v. Arizona, 384 U.S. 436 (1966).

[3] Defendant's responses to Trooper Wassmer's pre-Miranda questioning were not introduced at the suppression hearing.

replied, "The plate's on the wrong car[,]" and also stated "that he [was] out past time" (R. 217)[4].

Approximately 15 minutes later, while defendant was being transported to the county jail, he initiated further conversation with the trooper (R. 218). Specifically, defendant asked, "So what are you charging me with?" (R. 218). Trooper Wassmer told defendant that he would be charged with "[e]vading, improper registration, no driver's license, no insurance, and possession of cocaine" (R. 218). Defendant stated: "Hey, man, I'll admit to everything else, but the cocaine isn't mine" (R. 218). Seeking clarification of defendant's admission, Trooper Wassmer asked defendant: "So you admit you saw my lights and were trying to run from me?" (R. 219). Defendant said, "Yeah, I was, but the cocaine isn't mine" (R. 219).

During the entirety of his encounter with defendant, Trooper Wassmer experienced no difficulty communicating with defendant in English (R. 229). Trooper Wassmer observed that defendant spoke English well and appeared to understand the trooper's questions (R. 229).

Prior to trial, defendant filed a motion to suppress "all statements made by him to police" (R. 23), and a motion in limine to exclude: 1) "all evidence concerning alleged cocaine found in proximity to [defendant] . . . ; 2) all evidence that [defendant] was on probation . . . ; 3) all evidence of

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[4] A reference to defendant's status as a probationer (R. 219).

[defendant's] criminal history; and 4) any other evidence which the prosecution intends to present which reflects poorly on [defendant's] character . . ." (R. 25-26).

An evidentiary hearing was held on September 26, 1995. In argument to the court, the prosecutor clarified that he did not intend to introduce any evidence of defendant's cocaine possession or other bad acts evidence; nor did he intend to introduce any conversation that occurred between defendant and Trooper Wassmer prior to the administration of Miranda warnings (R. 231, 239).

Defense counsel argued that the trooper should have tape recorded his conversation with defendant, that defendant was entitled to a Miranda warning prior to any questioning; and that defendant had not waived his Miranda rights, but had equivocally invoked his right to silence (R. 235-36). Finally, defense counsel challenged the voluntariness of defendant's admissions (R. 237).

In light of the prosecutor's representation that he would not attempt to introduce defendant's pre-Miranda statements, the trial court denied defendant's motion to suppress, finding as follows:

> Trooper Wassmer arrested defendant and a few moments later, in Trooper Wassmer's car, advised the defendant of his Miranda rights by reading them from a standard DUI form.
>
> Trooper Wassmer asked the defendant if he understood his Miranda rights. The defendant replied[,] "Yes."

> Trooper Wassmer asked the defendant if he would answer questions. The defendant stated[,] "I don't know." Trooper Wassmer said[,] "You don't have to answer questions if you don't want to. It's up to you." The defendant nodded his head in an affirmative manner.
>
> Trooper Wassmer then asked, "So why did you run?" The defendant immediately answered, "The plates are on the wrong car."
>
> Trooper Wassmer did not record this conversation.

(R. 63-64) (a complete copy of the trial court's Findings of Fact, Conclusions of Law, and Order, is attached as addendum A).

Based on the above findings, the trial court concluded:

> Proper Miranda warnings were administered to [] defendant by Trooper Wassmer.
>
> [D]efendant understood his Miranda rights.
>
> [D]efendant knowingly, intelligently, and voluntarily waived his Miranda rights before questioning ensued.
>
> The questions and answers given post-Miranda are admissible in the trial.
>
> Trooper Wassmer's in the field unrecorded questioning of the defendant did not violate any of [] defendant's constitutional rights.

(R. 65), see addendum A.

SUMMARY OF THE ARGUMENT

POINT I

It is well established that absent any record of coercion, the mere fact of a prior Miranda violation does not render inadmissible admissions obtained following a subsequent and valid waiver of Miranda rights. Oregon v. Elstad, 470 U.S. 298 (1985). Because there is no claim or record of coercion

regarding either defendant's pre- and/or post-Miranda admissions in this case, the trial court properly ruled that defendant's post-Miranda statements were admissible.

Upon being advised of his Miranda rights, defendant was initially uncertain whether he wanted to speak with police. However, he nodded his head affirmatively when Trooper Wassmer further explained that he did not have to talk if he did not want to. Additionally, defendant, unhesitatingly gave an incriminating response to the trooper's follow-up questioning. Recent controlling authority from the United States Supreme Court definitively held that police are not required to cease questioning of a suspect who has equivocally invoked his right to counsel, nor are they limited solely to asking clarifying questions. Davis v. United States, 114 S.Ct. 2350 (1994). Thus, analogizing to the instant facts, the trooper's questioning of defendant was proper. Further, the Utah Supreme Court has held similar affirmative conduct in response to police questioning to constitute a valid Miranda waiver. State v. Kelly, 718 P.2d 385 (Utah 1986); State v. Calamity, 735 P.2d 39 (Utah 1987). Accordingly, the trial court reasonably exercised its discretion to determine that defendant's waiver of Miranda rights was knowing, intelligent and voluntary.

POINT II

Defendant's complaint that the trial court's limitation of his cross-examination of Trooper Wassmer violated his constitutional right of confrontation is not properly before

Court. Defendant failed to specifically preserve his claim of constitutional error below; nor has he asserted plain error or other exceptional circumstance excusing his waiver on appeal.

The trial court properly determined under rule 403, Utah Rules of Evidence, that defendant's attempt to cross-examine the trooper concerning the omission of the Miranda violation from his report, without also bringing out defendant's previously suppressed and incriminating statements, would unnecessarily confuse and mislead the jury. Defendant has failed to adequately challenge the trial court's rule 403 determination in his brief on appeal. He only briefly describes the perceived effect of the court's ruling on his defense and offers no analysis regarding how or why the evidentiary ruling constitutes an abuse of the trial court's broad discretion. State v. Pena, 869 P.2d, 932, 938 (Utah 1994). Consequently, the issue is waived due to defendant's non-compliance with the briefing rule. Utah R. App. P. 24(a)(9); State v. Price, 827 P.2d 247, 249 n.5 (Utah App. 1992).

In any event, the right to confrontation is properly limited by rule 403. The trial court made a well considered determination that the limited probative value of impeaching the trooper with the omission of the Miranda violation from his report was outweighed by its strong tendency to confuse and mislead the jurors, particularly if introduced in the isolated context requested by defendant.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY CONCLUDED THAT DEFENDANT'S WAIVER OF MIRANDA RIGHTS WAS KNOWING, INTELLIGENT, AND VOLUNTARY

The trial court's conclusion that defendant voluntarily, knowingly, and intelligently waived his Miranda rights is well supported in the record. Defendant does not dispute the trial court's findings that Trooper Wassmer advised him of his rights and that he told the trooper he understood those rights (R. 64), see addendum A. While defendant initially told the trooper that he did not know *if* he wanted to waive his rights, defendant does not dispute that he subsequently nodded his head in understanding when Trooper Wassmer explained that he "didn't have to talk . . . if he didn't want to," nor does defendant dispute that he then proceeded to answer the trooper's questions (R. 64), see addendum A.

Rather, defendant challenges the trial court's waiver determination on the narrow grounds that the trooper's pre-Miranda questioning impermissibly tainted his post-Miranda statements, and that his "mere nodding of the head" was inadequate to constitute a valid Miranda waiver. Br. of App. at 11-16, 20, 23, 27. Defendant's contentions lack merit.

A. Pre-Miranda Confession Does Not Bar Admission of Post-Miranda Statements

In Point I(A) of his brief, defendant claims that his unwarned confession "let the cat out of the bag[;]" consequently,

his later confession, obtained after a Miranda waiver, is barred.[5] Br. of App. at 12, 16. The Utah Supreme Court considered and rejected a similar challenge to the admission of a post-Miranda confession in State v. James, 858 P.2d 1012, 1016 (Utah 1993). See also State v. Bishop, 753 P.2d 439, 465-66 (Utah 1988). As recognized in James, the United States Supreme Court "definitively addressed" this issue Oregon v. Elstad, 470 U.S. 298 (1985).

Elstad clarified that the "Fifth Amendment prohibits only *coerced* confessions." James, 858 P.2d at 1016 (citing 470 U.S. at 306-07) (emphasis added). While Miranda warnings are intended to serve the Fifth Amendment goal, they may also "sweep[] more broadly" than the amendment. Elstad, 470 U.S. at 306. Specifically, "[f]ailure to administer Miranda warnings creates a *presumption* of compulsion." Elstad, 470 U.S. at 307 (emphasis added). Thus, Miranda can be "triggered even in the absence of a Fifth Amendment violation." Elstad, 470 U.S. at 306. For example, "unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under Miranda." Elstad, 470 U.S. at 307.

Significantly, however, Elstad further clarified that the presumption of coercion attendant to a pre-Miranda confession does not attach to a later confession, obtained after a Miranda

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[5] The State's refutation of defendant's claim of an inadequate waiver is set forth in Part B, infra.

waiver. Indeed, "once warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities." Elstad at 308. Accordingly, the Supreme Court ruled that

> absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of Miranda warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement.

470 U.S. at 314. Under the above circumstance, Elstad concludes that a trial court could reasonably determine that a suspect "made a rational and intelligent choice whether to waive or invoke his rights." Id.

Applying Elstad and James to the instant facts, the crucial issue is the voluntariness of defendant's second, post-Miranda confession, and not whether it can be tied to the

presumptively involuntary first confession.[6] It is therefore significant that defendant makes no claim and points to no record evidence of coercion regarding either the circumstances of his initial unwarned confession, or his subsequent warned admissions. Br. of App. at 11-16. See James, 858 P.2d at 1016 ("Unless the record indicates otherwise, failure to administer a Miranda warning before interrogating defendant does not create a presumption that defendant's second confession was compelled."); Bishop, 753 P.2d at 466 (affirming admission of Bishop's warned statements, citing absence of police coercion during both pre- and post-Miranda questioning).

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[6] To the extent that defendant's subheading I(A) and n.4 suggest the Court must engage in an attenuation analysis to determine if his confession was obtained in the course of police exploitation of a prior illegality, the argument is waived. Defendant made no argument concerning the alleged necessity of an attenuation analysis below and his vague and unanalyzed references to the argument on appeal are inadequate under the briefing rule. State v. Price, 827 P.2d 247, 249 (Utah App. 1992). See also Utah R. App. P. 24(a)(9) ("The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for review any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on."). Defendant has not alleged plain error or any exceptional circumstance to excuse his waiver of the issue. State v. Brown, 856 P.2d 358, 359 (Utah App. 1993).

Moreover, the Miranda violation alleged here does *not* amount to a constitutional deprivation, let alone a Fourth Amendment violation of the type necessitating an attenuation analysis. See Elstad, 470 U.S. at 306 ("a procedural Miranda violation differs in significant respects from violations of the Fourth Amendment, which have traditionally mandated a broad application of the 'fruits' doctrine."). See also State v. Allen, 839 P.2d 291, 300 (Utah 1992) (engaging in attenuation analysis to determine effect of alleged *illegal arrest*, a fourth amendment issue, on Allen's post-Miranda admissions).

Because there is no claim or record of coercion before the Court, and because the mere fact of the prior Miranda violation does not create a presumption of coercion attendant to defendant's post-Miranda admissions, the trial court did not abuse its broad discretion in rejecting defendant's claim of involuntariness on these facts.

B. Acknowledgment of Understanding and Affirmative Response to Police Questioning Constitutes Valid Miranda Waiver

Turning to defendant's challenge to the trial court's waiver determination, the Utah Supreme Court recently reiterated that "police may question an individual who agrees to speak with them after being read his Miranda rights." State v. Villarreal, 889 P.2d 419, 426, (Utah 1995). In Point I(B) of his brief, defendant asserts that his "mere nodding of the head was not an appropriate clarification" of his intention to waive his Miranda rights and therefore all statements made following the warning should be suppressed. Br. of App. at 23. Significantly, defendant does not dispute that he understood his Miranda rights, or that he never unequivocally invoked his rights. Br. of App. at 17-29. Further, as previously noted in Part A, supra, defendant makes no assertion that he was physically or psychologically coerced into relinquishing his Miranda rights. Id.[7] Consequently, the issue before the Court is whether, in

[7] See State v. Hegelman, 717 P.2d 1348, 1349 (Utah 1986) ("Evidence sufficient to support a finding that a confession is involuntary must reveal some physical or psychological force or manipulation that is designed to induce the accused to talk when he otherwise would not have done so.").

spite of an equivocal invocation of the right to silence, defendant's subsequent affirmative head nodding and incriminating responses to police questioning constituted a valid Miranda waiver.

As further noted in Part A, supra, the Fifth Amendment guarantees a criminal defendant that he "shall not be 'compelled . . . to be a witness against himself.'" State v. Wood, 868 P.2d 70, 81, (Utah 1993). To that end, Miranda v. Arizona, 384 U.S. 436, 444 (1966), established procedural safeguards requiring police to inform a suspect that he has the right to remain silent and the right to have an attorney present during questioning. Wood, 868 P.2d at 81. However, it is the suspect's burden to affirmatively invoke his right to silence. State v. Calamity, 735 P.2d 39, 41 (Utah 1987) (quoting Hegelman, 717 P.2d at 1349). Accordingly, a Miranda waiver may be inferred from a suspect's "acknowledgement of [] understanding" and "subsequent course of conduct," id., including "actions and words[.]" State v. Pena, 869 P.2d 932, 941 (Utah 1994) (quoting North Carolina v. Butler, 441 U.S. 369, 373 (1979)). A Miranda waiver is determined under the totality of the circumstances and it is the State's burden to prove by a preponderance of the evidence that the waiver was voluntary, knowing, and intelligent. Wood, 868 P.2d at 81; Bishop, 753 P.2d at 463; Calamity, 735 P.2d at 41.

Defendant's equivocal, "I don't know," response to Trooper Wassmer's initial request for a Miranda waiver does not constitute an affirmative invocation of the right to silence.

Calamity, 735 P.2d at 41; Hegelman, 717 P.2d at 1349.[8] In State v. Kelly, the Utah Supreme Court considered similar equivocating conduct and upheld the trial court's waiver determination. 718 P.2d 385, 392 (Utah 1986). Like defendant, Kelly initially hesitated when, following the giving of Miranda warnings, police asked if he wanted to answer questions, stating: "I don't know. It depends." Kelly, 718 P.2d at 392. An officer told Kelly that he "needed a yes or no answer, but [Kelly] did not respond." Id. at 388. The officer then asked what Kelly had been wearing that night and Kelly pointed to clothing lying at his feet. Id. When the officer picked up the clothing, Kelly spontaneously stated that he wanted to level with police and made certain admissions. Id.

In affirming the trial court's Miranda waiver ruling, the supreme court held that in view of Kelly's initial equivocal response, it was proper for the police to ask further questions. Id. at 392. The supreme court also cited Kelly's affirmative

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[8] Indeed, defendant's authority deals primarily with the procedures to be followed upon an *equivocal* invocation of Miranda rights. See Br. of App. at 17-29 (citing State v. Sampson, 808 P.2d 1100 (Utah App. 1990) and State v. Gutierrez, 864 P.2d 894 (Utah App. 1993)). To the extent Sampson and Gutierrez mandate that only clarifying questions may be asked once a suspect equivocally invokes his Miranda rights, they are overruled by recent controlling authority from the United States Supreme Court, Davis v. United States, 114 S.Ct. 2350 (1994). Davis definitively held that police are not required to cease questioning of a suspect who has equivocally invoked his right to counsel, nor are they limited solely to asking clarifying questions. 114 S.Ct. at 2355-56. Thus, analogizing to the instant case, Trooper Wassmer's post-Miranda questioning of defendant was proper.

conduct in spontaneously responding to the officer's questions with particular admissions. Id. Accord Davis, 114 S.Ct. at 2355-56.

Calamity is another factually similar case further emphasizing that affirmative conduct in response to police questioning constitutes a valid Miranda waiver. Calamity, 735 P.2d at 41. Unlike defendant and Kelly, Calamity made no arguably equivocal invocation of Miranda rights. However, like defendant, Calamity did not respond verbally when asked if he understood his Miranda rights, but rather, nodded his head. Calamity, 735 P.2d at 41. Calamity then complied with a police request that he write a voluntary statement, read his Miranda rights, and fill out a form. Calamity, 735 P.2d at 40.

Considering the totality of the circumstances, the supreme court concluded that Calamity's written confession "must be viewed as having been made under a valid waiver." Id. at 41. In particular, the supreme court noted the lack of evidence that police had in any way coerced the waiver, that Calamity was fully apprised he did not have to make the written the statement, and that Calamity benefitted from twice receiving the Miranda warnings. Calamity, 735 P.2d at 41.

As in the present case, neither Kelly nor Calamity verbally informed police of their ultimate willingness to waive their Miranda rights. Butler, 441 U.S. at 373 (rejecting argument that valid Miranda waiver requires an express written or oral statement). Rather, despite his earlier hesitancy, Kelly

demonstrated his willingness to answer questions by pointing to incriminating clothing and by spontaneously making certain admissions. Kelly, 718 P.2d at 392. Calamity experienced no hesitancy and similarly commenced to make a written statement as requested by police. Calamity, 735 P.2d at 40. See also Hegelman, 717 P.2d at 1349 (upholding waiver ruling where Hegelman indicated his understanding of Miranda rights, demonstrated no signs of fear before or after altercation with officer, and thereafter made incriminating statements to another officer when informed of the evidence against him).

Defendant's initial hesitancy to answer the trooper's questions may well have been "a natural reaction to being questioned, [but] does not indicate that his right to remain silent was violated." Villarreal, 889 P.2d at 426 (Utah 1995). Indeed, notwithstanding his initial hesitancy, defendant subsequently assured the officer that he understood his rights by nodding his head up and down (R. 64), see addendum A. This affirmative conduct, followed by defendant's unhesitating and incriminating response to the trooper's follow up questioning, adequately support the trial court's determination of a valid Miranda waiver. Accord People v. Sully 812 P.2d 163, 185 (Cal. 1991) (affirming waiver determination where defendant, a former police officer, expressly affirmed his understanding of his Miranda rights and then proceeded to answer questions), cert. denied, 503 U.S. 944 (1992); United States v. Ogden, 572 F.2d 501, 502 (5th Cir.) (waiver adequately indicated by defendant's

expression of understanding followed by an incriminating statement), cert. denied, 439 U.S. 979 (1978); People v. Johnson, 450 P.2d 865, 874 (Cal.) ("Once the defendant has been informed of his rights and indicates that he understands those rights, it would seem that his choosing to speak and not requesting a lawyer is sufficient evidence that he knows his rights and chooses not to exercise them."), cert. denied, 395 U.S. 969 (1969).

Consistent with Butler, Kelly, Calamity, and Hegelman, the preponderance of the evidence in this case indicates the trial court reasonably exercised its discretion to conclude that defendant's Miranda waiver was knowing, intelligent, and voluntary. This Court should so hold.

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN LIMITING DEFENDANT'S CROSS-EXAMINATION OF TROOPER WASSMER UNDER RULE 403, UTAH RULES OF EVIDENCE

A. Waiver of Claimed Constitutional Violation

At trial, defense counsel attempted to cross-examine Trooper Wassmer about the fact that the Miranda violation was not mentioned in the trooper's report of the incident (R. 306) (a copy of the pertinent portion of the transcript is attached as addendum B). Upon objection from the prosecutor, defense counsel stated:

> It's my position that it's part of our constitutional rights to present a defense to the let [sic] the jurors know that this officer violated the law, that being Miranda, and failed to put it in his police report. I think it's fundamental to our confrontation

(R. 308), see addendum B.

Further, although defense counsel wanted to introduce the Miranda violation, she did not want to bring out the substance of the pre-Miranda questioning or defendant's incriminating responses thereto and reminded the trial court that that evidence had been ruled inadmissible under rules 403 and 404, Utah Rules of Evidence (R. 308-09), see addendum B. The prosecutor responded that to introduce the fact of the Miranda violation without also introducing the questions asked and defendant's responses would mislead and confuse the jury (R. 310), see addendum B.

The trial court sustained the State's objection under rule 403, Utah Rules of Evidence,[9] ruling that the probative value of the evidence was outweighed by the danger of misleading and confusing the jury (R. 315-17), see addendum B.

For the first time on appeal, defendant alleges that the trial court "precluded [him] from attacking Trooper Wassmer's credibility during cross-examination[,]" and that the limitation amounted to a violation of his "constitutional right of cross-examination." Br. of App. at 30, 33. Defendant, however, fails to indicate where in the record he preserved this precise claim

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[9] Utah R. Evid. 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

below. See Utah R. App. P. 24(a)(5)(a). Nor has he asserted plain error or any exceptional circumstance that would justify this Court's consideration of his constitutional claim. Utah R. App. P. 24(a)(9); State v. Martinez, 848 P.2d 702, 705 n.2 (Utah App. 1993); State v. Archambeau, 820 P.2d 920, 922 (Utah App. 1992).

Moreover, defendant's "nominal allusion" to a general right of confrontation below is inadequate to preserve the constitutional violation he alleges on appeal. See, e.g., State v. Bobo, 803 P.2d 1268, 1273 (Utah 1990) ("the proper forum in which to commence thoughtful and probing analysis of state constitutional interpretation is before the trial court"). See also State v. Johnson, 774 P.2d 1141, 1144-45 (Utah 1989) (finding "general motion" below failed to "specifically or distinctly" preserve grounds for appeal as required by the waiver rule). The reference was neither distinct nor specific and wholly failed to articulate a federal or state constitutional right of confrontation that would justify admission of the contested evidence. State v. Carter, 707 P.2d 656, 661 (Utah 1985) ("where a defendant fails to assert a particular ground for suppressing unlawfully obtained evidence in the trial court, an appellate court will not consider that ground on appeal"). Rather than articulate how defendant's right of confrontation was violated (particularly where the trooper was on the stand and available to answer questions), defense counsel's complaint centered on the court's refusal to allow a line of questioning

which the trial court reasonably found objectionable under rule 403 (R. 308-316), see addendum B.[10] Consequently, the only issue properly before the Court is the propriety of the trial court's limitation of defendant's cross-examination under rule 403.

Even if the Court deems defense counsel adequately articulated a constitutional argument below, the trial court did not address the constitutional right of confrontation in its ruling. "[W]here defendant fails to invoke a ruling on his motion, he has waived the issue for purposes of appeal." State v. Ortiz, 782 P.2d 959, 961 (Utah App. 1989), cert. denied, 795 P.2d 1138 (Utah 1990). Thus, the issue remains inadequately preserved for review.

B. Inadequate Challenge to Trial Court's Rule 403 Determination

As for the propriety of the trial court's rule 403 limitation on defendant's cross-examination of Trooper Wassmer, defendant has not adequately challenged the ruling on appeal. Defendant only briefly describes the perceived effect of the ruling on his defense, Br. of App. at 31, and offers no analysis regarding how or why the evidentiary ruling constitutes an abuse

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[10] Defendant asserts that following its rule 403 determination, the trial court erroneously found that defense counsel "had explored the full extent of Trooper Wassmer's pre-Miranda violations and the nature of the omissions from his police report[.]" Br. of App. at 31 n.9. Defendant misreads the record which merely reflects defense counsel's request to make a record of her proffered questions and the trial court's acknowledgement that: "the record can reflect that you've [defense counsel] asked the opportunity to question the officer about certain matters which I've ruled to be improper" (R. 320).

of the trial court's "broad" discretion. See State v. Pena, 869 P.2d 932, 938 (Utah 1994) (dicta). See also State v. Hamilton,26 827 P.2d 232, 239-40 (Utah 1992) (reviewing trial court's rule 403 determination for "reasonability").

To the extent the issue is mentioned in defendant's brief, it is merely incidental to his chief complaint concerning the alleged harmfulness of the claimed abridgment of his constitutional right of confrontation. Br. of App. at 31-35. Defendant's nominal complaint regarding the trial court's rule 403 determination is inadequate under the briefing rule and should be rejected by the Court. Utah R. App. Pro. 24(a)(9) ("The argument shall contain the contentions and reasons of the appellant with respect to the issues presented . . ."). See State v. Price, 827 P.2d 247, 249 n.5 (Utah App. 1992) (citing cases disposed of on appeal for failure to provide meaningful analysis and otherwise comply with the briefing rule).

C. Trial Court Has Broad Discretion to Limit Cross-Examination Under Rule 403

In any event, the constitutional right of confrontation is not boundless, but is properly restricted by rule 403. See, e.g., State v. Hackford, 737 P.2d 200, 203 (Utah 1987) (cross-examination for bias properly limited under rule 403); State v. Cox, 826 P.2d 656, 661 (Utah App. 1992) (same). In the present case, the trial court expressly weighed the limited probative value of impeaching the trooper with the omission of the Miranda violation from his report, against its strong tendency to confuse

and mislead the jurors, particularly if introduced in the isolated context requested by defendant:

> To now attempt to bring in the officer's omission of the pre-Miranda statements would no doubt create in the jurors' minds concern about what was said and mislead and confuse them. I've ruled that pre-Miranda statements were not admissible, and now to attempt to show the officer omitted these statements from his report, while probative as bearing upon his credibility, is substantially outweighed, in my view, by the danger of misleading or confusing the jury. Therefore, the questioning about the claimed omission of the pre-Miranda statements from the officer's statement is disallowed.
>
> . . .
>
> [T]he issue of the omission by the officer of these statements from his report seems to me to still be one of considerable import to this Court and the jurors' consideration of the issues. The statements that were made have been excluded. To now attempt to establish that by leaving them out of the report, whatever they were, of course, which won't come to the jurors' attention, would be, in my judgment, confusing to jury [sic] and very likely mislead them[,] in the sense that they would not know what it was that was omitted here, would not know why it was that this information is being kept from them[,] and potentially, therefore, I think it is -- the danger of misleading and confusing them far outweighs the probative value of pointing to an omission of an officer's report.

(R. 315-17), see addendum B (emphasis added).

Defendant's conclusory assertion that the above ruling caused the jury to be mislead concerning the trooper's credibility, Br. of App. at 30-31, fails to pinpoint any abuse of the court's broad discretion. Pena, 869 P.2d at 938. To the contrary, the ruling is adequately detailed and well considered. See Hackford, 737 P.2d at 204 (noting preference for express

findings in the record allowing the reviewing court to understand the trial court's reasons for barring or limiting cross-examination).

Furthermore, defendant was afforded adequate opportunity to challenge the trooper's credibility before the jury. Defendant extensively cross-examined the trooper concerning the facts that the incident was neither videotaped nor recorded and that the trooper did not obtain a written waiver of rights from defendant (R. 319-320, 332-333, 337-38). Defendant also brought out alleged inconsistencies and discrepancies in the trooper's testimony including whether the trooper could remember which side of defendant's car was sagging (R. 321-23). Defendant further established that the trooper never issued a citation for the equipment violation, and that the trooper never reported the equipment violation to dispatch (R. 324). Defense counsel highlighted the above testimony and other alleged inconsistencies in closing argument, suggesting to the jury that the trooper had lied and was therefore unreliable (R. 350-54). Thus, the record itself refutes defendant's claim that the trial court's limitation of cross-examination precluded his ability to attack the trooper's credibility.

Moreover, consistent with the court's ruling, none of defendant's pre-Miranda admissions were introduced at trial. Indeed, there was no evidence of defendant's cocaine possession or his probationary status. Rather, Trooper Wassmer testified solely concerning defendant's post-Miranda admissions that the

license plates were on the wrong car and that defendant had tried to flee from the trooper (R. 300-01). Assuming defendant had prevailed in his attempt to cross-examine Trooper Wassmer concerning the narrow fact of the Miranda violation, he risked admission of his previously suppressed incriminating statements. As noted by the trial court, bringing out the pre-Miranda admissions would have been necessary to explain the circumstances surrounding the Miranda violation and thereby avoid undue and irrelevant speculation by the jury (R. 311-13).

CONCLUSION

The Court should uphold the trial court's rulings admitting defendant's post-Miranda admissions and limiting defendant's cross-examination of Trooper Wassmer, and should affirm defendant's third degree felony conviction.

RESPECTFULLY SUBMITTED this 6th day of June, 1995.

JAN GRAHAM
Attorney General

Marian Decker

MARIAN DECKER
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to RONALD S. FUJINO, SALT LAKE LEGAL DEFENDER ASSOC., attorney for appellant, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 9th day of July, 1995.

Marian Decker

ADDENDA

ADDENDUM A

Findings of Fact and Conclusions
of Law on Defendant's Motion to Suppress

DAVID E. YOCOM
Salt Lake County Attorney
ROBERT L. STOTT, Bar No. 3131
Deputy County Attorney
231 East 400 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 363-7900

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, -vs- ROGELIO LEYVA LIMONTA, Defendant.	FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DEFENDANT'S MOTION TO SUPRESS Case No. 941901168FS Hon. J. Dennis Frederick

The above-entitled matter came before the Court on September 26, 1994, to hear argument on the defendant's Motion to Suppress. Defendant was represented by his attorney, Elizabeth Hunt, and the State was represented by Robert L. Stott. The Court having heard argument and evidence presented by the parties, hereby makes the following findings

FINDINGS OF FACT

1. On July 24, 1994, at approximately 9:00 PM, Utah Highway Trooper Jon Wassmer was on duty and traveling in his marked Highway Patrol vehicle on I-15 near 4500 South in Salt Lake County.

2. Trooper Wassmer noticed a vehicle traveling the same direction which appeared to sag badly on one side.

3. Trooper Wassmer asked Dispatch to run the license plate number to determine its registration. He learned that the plate was registered to an 1984 Buick.

4. The vehicle was, however, as Trooper Wassman could see, an Oldsmobile.

5. Trooper Wassmer pulled in behind the vehicle and activated his overhead lights.

6. Rather than stopping the vehicle immediately, increased its speed from 55 mph to 75 mph and sped down the freeway.

7. Trooper Wassmer activiated his siren and pursued the vehicle which eventually left the freeway at 90th South and crashed as it attempted to make a turn.

8. The defendant was, and had been driving the car.

9. Trooper Wassmer arrested the defendant and a few moments later, in Trooper Wassmer's car, advised the defendant of his *Miranda* rights by reading them from a standard DUI form.

10. Trooper Wassmer asked the defendant if he understood his *Miranda* rights. The defendant replied "Yes."

11. Trooper Wassmer asked the defendant if he would answer questions. The defendant stated "I don't know." Trooper Wassmer said "You don't have to answer questions if you don't want to. It's up to you." The defendant nodded his head in an affirmative manner.

12. Trooper Wassmer then asked, "So why did you run?" The defendant immediately answered, "The plates are on the wrong car."

13. Trooper Wassmer did not record this conversation.

WHEREFORE, having entered its Findings of Facts, the Court now makes the following conclusions

CONCLUSIONS OF LAW

1. The stop and arrest of the defendant by Trooper Wassmer was based upon his observing traffic violations occurring in his presense: license plate violation, speeding, and failure to respond to an officer's signal.

2. The defendant's arrest and stop did not violate either Utah or United States constitutional provisions.

3. Proper *Miranda* warnings were administered to the defendant by Trooper Wassmer.

4. The defendant understood his *Miranda* rights.

5. The defendant knowingly, intelligently, and voluntarily waived his *Miranda* rights before questioning ensued.

6. The questions and answers given post-*Miranda* are admissible in the trial.

7. Trooper Wassmer's in the field unrecorded questioning of the defendant did not violate any of the defendant's constitutional rights.

DATED this 11th day of October, 1994.

BY THE COURT:

J. DENNIS FREDERICK
Third District Court Judge

APPROVED AS TO FORM:

ELIZABETH HUNT

DAVID E. YOCOM
Salt Lake County Attorney
ROBERT L. STOTT, Bar No. 3131
Deputy County Attorney
231 East 400 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 363-7900

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH,	)	
Plaintiff,	)	ORDER
-vs-	)	
	)	Case No. 941901168FS
ROGELIO LEYVA LIMONTA,	)	
Defendant.	)	Hon. J. Dennis Frederick

Based upon the Court's Findings of Fact and Conclusions of Law, now, therefore;

IT IS HEREBY ORDERED that the defendant's Motion to Suppress is denied.

DATED this 11th day of October, 1994.

BY THE COURT:

J. DENNIS FREDERICK
Third District Court Judge

THIRD DISTRICT COURT SALT LAKE

CERTIFICATE OF DELIVERY

I hereby certify that I delivered a true and correct copy of the foregoing to Elizabeth Hunt, at the office of the Salt Lake Legal Defenders Association, 424 East 500 South, Suite 300, Salt Lake City Ut 84111, this _____ day of October, 1994.

ADDENDUM B

Transcript of Suppression Hearing

Q How many days?

A Just a few.

Q And is it your position that the report is complete?

A I believe so, yes.

Q It's your testimony today that you approached Mr. Leyva after his car had stopped, and when you approached him, you gave him Miranda warnings and then proceeded to interrogate him and then proceeded to obtain a confession, correct?

A That's correct.

Q And that's what your report says, too, right?

A It does.

Q In fact, didn't you ask Mr. Leyva some incriminating questions before you ever gave him the Miranda warnings?

A I did ask him one question before.

MR. STOTT: Your Honor, may we approach the bench?

THE COURT: All right. Come up here, folks.

(Whereupon, both counsel and the Court conferred at the bench out of the hearing of the jury and the Reporter.)

THE COURT: Members of the jury, we have come upon an issue of law that I must resolve with the lawyers in this case. It's near enough, however, to your noon recess that I'm going to release you and remind you again of the

admonition I've given you.

You are free until 1:30 this afternoon, at which time we'll reconvene and hear the balance of the evidence in the case. The jury is now excused.

(Whereupon, the jury exited the courtroom.)

THE COURT: Okay. The jury has now left the courtroom. There appears to be a difference of view about what was or was not stipulated to, and I want you to state, Mr. Stott, for the record your objection or request from the bench conference and I'll hear from Ms. Hunt.

MR. STOTT: Well, I gathered from our discussion at the bench that her intent is to try to establish that somehow the officer violated Miranda warnings. So my position is that we've had a hearing on that and the Court ruled that there was no Miranda warning violation, and also the State did not inquire into any questioning that went on before the Miranda warnings were given, so I think it's improper for her to now somehow try to imply that the officer failed to give the correct Miranda warning when, one, we aren't using that as part of our evidence and, two, the Court made a ruling that Miranda warnings were complied with.

THE COURT: All right. Ms. Hunt, do you wish to respond?

MS. HUNT: I do, your Honor. I have the preliminary hearing transcript and also the motion hearing

transcript which clearly establishes a Miranda violation. Mr. Stott himself stated at the hearing on the motion to suppress that there was, quote, some indication that there was a conversation before Miranda. I have no intentions of bringing out any of that conversation.

Now, the fact that Mr. Stott is not bringing in that conversation is immaterial because the officer supposedly got the confession before and after Miranda, the content being the same.

It's my position that it's part of our constitutional rights to present a defense to the let the jurors know that this officer violated the law, that being Miranda, and failed to put it in his police report. I think it's fundamental to our confrontation.

THE COURT: It's been some time since the suppression hearing. What was the question asking and what was the response given to the question that you're referring to that was presumably prior to Miranda?

MS. HUNT: Well, that's not clear because the officer is not being consistent as to what the conversations were. However, I can find the exact pages of each transcript for you if you'd give me just a minute.

Bob, I gave you a copy of the motion hearing transcript. Do you have that?

MR. STOTT: The motion or the prelim?

MS. HUNT: The motion hearing transcript.

I believe page 20 of the motion hearing transcript establishes --

THE COURT: Well, I'm not so much interested where in the transcript it was dealt with, I suppose, as I am interested to know what it is you're eliciting from the officer.

Now, if it's your point that the officer asked a question and the Defendant made a response that was prior to the giving of the Miranda warning, that was not, as I recall, I didn't recall that having been gone into as being part of your motion to suppress.

MS. HUNT: It was. I guess I didn't make myself clear, your Honor. The question reflected in the motion hearing transcript was that he asked him why he ran before he gave him a Miranda warning. He asked him whether he was on probation. Obviously I'm not going to bring that out in front of the jury because this Court has excluded that on grounds of 404, 403. He showed him the cocaine before the Miranda warning and he says he doesn't recall whether he asked him about the cocaine.

THE COURT: But that has not been part of the State's examination in chief. You're telling me, as I understand you, that you're not seeking the content of the question asked or the answer given, but simply that there was a

question asked and there was an answer given, and that that was prior to giving the Miranda warning, but that that does not appear in the report?

MS. HUNT: Yes.

THE COURT: All right. Is there any objection to that?

MR. STOTT: Well, yes. I think for the jury to be able to understand what she's getting at, they ought to know what the question and answer is. Just to say there was a question given and not know what the question was, or an answer was given and not know what the answer was, it's going to mislead the jury.

I think they should see the total picture because now we're getting into stuff that we agreed we wouldn't get into.

THE COURT: Well, you keep referring to an agreement, but apparently it's a one-sided agreement, Mr. Stott. I don't see Ms. Hunt agreeing to anything.

MR. STOTT: No, what I'm talking about is the cocaine and the probation because that's what the conversation was about.

THE COURT: Prior to the Miranda?

MR. STOTT: Yes. Also her Miranda motion went to this particular conversation. It seems to me that if there's a Miranda violation, then the evidence is not introduced, but

the fact of a Miranda violation is not relevant.

THE COURT: Well, I can't apparently establish that there was or was not an agreement that the inquiry that took place prior to the Miranda was going to be excluded.

MR. STOTT: I stated on the record --

THE COURT: Well, yeah, I guess I know your position that it's not going to be introduced, but it may be an offer that was not accepted by Ms. Hunt, and if that is the case, then I suppose if the issue -- if there's no agreement, in other words, I have ruled on what I understood to be the issues before me at the suppression hearing and if now you're inquiring into statements made and responses given by the Defendant that you contend were inappropriate, then I suppose that there is a significant chance that I will allow on redirect examination what was said and by whom. Do you follow me?

MS. HUNT: I do.

THE COURT: I think it is probably not the appropriate thing to do on the one hand to argue that the officer has violated Miranda by obtaining information from this Defendant to show that he is something less than stellar in his investigation, yet, on the same hand, argue that all of that discussion cannot be brought in. It may well be appropriate and fair, it seems to me, if that's the essence of your argument, then on redirect examination the officer be

allowed to state what it was that was said.

MS. HUNT: May I respond, your Honor?

THE COURT: You may.

MS. HUNT: Thank you. This Court excluded all reference to cocaine and to the fact that Mr. Leyva was on probation. The Court's exclusion --

THE COURT: Well, but the reference to the excluding of the cocaine was in response to the State's agreement not to introduce it.

MS. HUNT: That's right.

THE COURT: It had nothing to do with your motion.

MS. HUNT: Oh, that wasn't clear to me.

THE COURT: That was an acknowledgement by the State that they were not going to even get into the issue of cocaine possession. Consequently, as I recall, and I may be wrong about this, but I recall we were dealing specifically with statements made by the Defendant having to do with wrong plates on the car and out past time.

MS. HUNT: I think the cocaine issue is probably a moot point as far as what we're talking about now because the officer's testimony was that he didn't recall whether he asked about the cocaine or not, so I don't think the Prosecutor would need to bring that to the jury's attention because the officer doesn't recall it.

THE COURT: Well, but there was a comment made

about cocaine or at least cocaine was observed.

MS. HUNT: No, that was only my question. It was observed, yes, but that's not part of the Miranda violation.

THE COURT: I'm not quite clear on what it is we're doing other than trying through a back door to try to get out another hearing on a motion to suppress, and that may be wrong. I'm not saying it's right or wrong, Ms. Hunt, but it appears to me that if indeed statements made prior to Miranda warning were part of your motion to suppress and the ruling on those had to do with what was a presumed stipulation that the evidence would not be relied upon by the State, that was the basis of my ruling, not because of the evidence in the hearing but what I'm going to do is I'm going to allow us all to take this under consideration for a moment. I'm not saying that if you elicit from the officer the fact that he omitted to include in his report this pre-Miranda statement or statements, therefore, he's something less than a competent officer, I'm not going to rule yet on whether or not by opening that door he's going to be able to say what it was that he told the Defendant because apparently there was -- or the Defendant told him because apparently there was no agreement between you two that that wouldn't be brought into trial, so if you open the door, I may well determine to allow the officer to testify as to what was in fact said, and I'll let you know that at 1:30.

We'll be in recess until 1:30.

(Whereupon, a recess was taken.)

THE COURT: We are reconvened in the instant matter outside the hearing of the jury. The Defendant and both counsel are present.

Counsel, I have taken under advisement the objection, or at least the indication that there would be an objection to further inquiry of the trooper with regard to the omission in his report of the pre-Miranda statements engaged in between the officer and the Defendant.

Having reviewed my notes of the suppression hearing, as well as the transcript and Exhibit 1, the officer's report received during the course of that suppression hearing, I'm prepared to rule at this time.

This Court ruled that the questioning before the Miranda warning was excluded originally and this because the State agreed not to introduce such statements and because eliciting inculpatory statements prior to giving Miranda are properly excludable. However, here the Defendant seeks to introduce only that the trooper omitted reference to such statements in his report, ostensibly for the purpose of bearing on the credibility of the officer's testimony, without getting into what was actually said.

The motion to suppress refers, in this Court's view, only to post-Miranda waiver and/or statements. The

issue of omission of statements pre-Miranda was not addressed, in this Court's view, because the State conceded not to attempt introduction at the trial, but in any event, Rule 403 of the Rules of Evidence allows this Court discretion to exclude relevant evidence if it is probative, even though it may be probative, if the value of such evidence is substantially outweighed by, among other things, confusing the issues or misleading the jury.

Here the State has not sought, rightly so, to introduce the pre-Miranda statements. There was an agreement by Defense counsel at the suppression hearing, found on page 27, line 21 of the transcript of that hearing, wherein she concedes, "I have no intentions of bringing out any of that conversation before Miranda. I would agree that the Defendant was in custody at the time of the questioning which followed Miranda was given, so there's no question about custody in this particular case. I believe he was in custody."

To now attempt to bring in the officer's omission of the pre-Miranda statements would no doubt create in the jurors' minds concern about what was said and mislead and confuse them. I've ruled that pre-Miranda statements were not admissible, and now to attempt to show the officer omitted these statements from his report, while probative as bearing upon his credibility, is substantially outweighed, in

my view, by the danger of misleading or confusing the jury. Therefore, the questioning about the claimed omission of the pre-Miranda statements from the officer's statement is disallowed, so now let's bring the jury back in.

Ms. Hunt, you're waving your hand.

MS. HUNT: I am. May I have the benefit of the record just for a moment, your Honor?

THE COURT: Yes, you may.

MS. HUNT: Thank you very much. First of all, I'd like to call to the Court's attention that the portion of the motion hearing transcript that the Court just quoted was Mr. Stott speaking, not me.

THE COURT: Well, that's an important observation.

MS. HUNT: What I want to ask the officer is simply if he asked Mr. Limonta incriminating questions -- Mr. Leyva, excuse me, incriminating questions before the Miranda warnings and if he omitted that from his report.

The reason I want to do that is because it establishes both that that officer himself is breaking the law and that he's also excluding that from his report which is supposed to be documenting this case. I feel that this is integral to our defense. We don't have much to work with in this case other than to confront and cross-examine the officer.

The Miranda ruling itself excludes only the Defendant's statements. If there's a Miranda violation, it

does not exclude the fact that there was a Miranda violation, nor the officer's question.

That's about all I have to say as far as the Court's ruling goes.

THE COURT: Well, and that's fine. Let me first address the issue of the misquote. I apologize for having viewed Mr. Stott's language as that of your own. Nevertheless, my view is even had there not been an agreement, which apparently there was not, the issue of the omission by the officer of these statements from his report seems to me to still be one of considerable import to this Court and the jurors' consideration of the issues. The statements that were made have been excluded. To now attempt to establish that by leaving them out of the report, whatever they were, of course, which won't come to the jurors' attention, would be, in my judgment, confusing to jury and very likely mislead them in the sense that they would not know what it was that was omitted here, would not know why it was that this information is being kept from them and potentially, therefore, I think it is -- the danger of misleading and confusing them far outweighs the probative value of pointing to an omission of an officer's report. Therefore, the ruling is the same, so we'll bring the jury back in, let you continue with your examination of the trooper within the confines of the ruling that I've now made.